BASIS OF JURISDICTION.

The judgment of the Court of Appeals was entered January 28, 1966. Petition for rehearing was denied March 2, 1966. Mandate was stayed March 7, 1966. Jurisdiction is invoked under Title 28, United States Code, § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

The primary question is whether the defendant, by pursuing a course of conduct placing the plaintiff dealer in a precarious economic situation, followed by a demand that plaintiff accept an Edsel franchise as a condition to retaining the Lincoln-Mercury franchises or resign—coupled with threats of cancellation, refusal to pay fair market value for signs, parts, and equipment, and other threats—creates a situation entitling plaintiff to a jury trial upon the issues of:

A. Economic or moral duress;

B. A violation of the Dealer's Day in Court Act;

C. A "tying" violation of the Sherman Act.

2. There is a further question as to whether a release, so secured, automatically bars an action for such statutory wrongs when the dealer, in effect, had no volition or whether a jury may determine whether enforcement of such release is unconscionable where secured by such coercive conduct.

STATUTORY QUESTIONS.

The pertinent statutes are the Dealer's Day in Court Act, 15 *U. S. C.*, §§ 1221-1224 and the Sherman Act, 15 *U. S. C.*, §§ 1, 14, 15. The pertinent portions of these statutes, and the discussions contained in the *Congressional & Administrative News* of the 84th Congress are contained in the Addendum.

STATEMENT OF THE CASE.

The facts are not accurately stated in the opinion of the Court of Appeals; therefore, they will be restated.

The Amended Complaint was filed in two counts. Count I was under the antitrust laws alleging illegal contracts or conspiracy on the part of the defendant to force the plaintiff and other Lincoln-Mercury dealers to accept an Edsel franchise as a condition to retaining their existing franchises; and, when plaintiff refused to accept such Edsel franchise, compelling plaintiff to resign its existing franchises and to execute a release, through economic compulsion and duress, for a consideration far less than the value of such franchise which was then worth $300,000. Count II was based upon the same facts but relief was sought under the Dealer's Day in Court Act. A motion to strike the Amended Complaint and to dismiss the action was filed and argued, but denied by Judge Robson in an extended opinion (App. 14-18). The defendant then filed an answer upon December 19, 1962, denying the charges of the complaint and denying that it at any time made the acceptance of the Edsel franchise a condition for retention of the Lincoln-Mercury franchises. Ford pleaded several affirmative defenses including the execution of the release which the plaintiff had assigned as one of the acts of duress in its Amended Complaint. Plaintiff filed a reply to the affirmative matters stating, in part (App. 24, 25) that the release was executed under moral or economic duress and in furtherance of the wrongful purpose in requiring an acceptance of a "tied" product. Two years after the filing of its answer, and only three weeks before the trial by jury was to commence, defendant Ford Motor Company filed a motion for summary judgment, supported by affidavits and depositions, which was countered by affidavits, exhibits, and depositions on behalf of the plaintiff. The trial court removed the case

from the jury calendar and, following argument, granted the motion for summary judgment (Abst. 70). This was affirmed by the Court of Appeals.

Since only those facts favorable to the plaintiff, and in the light most favorable to the plaintiff, may be considered upon a motion for summary judgment, we will disregard conflicts in stating the facts, which are as follows:

Elwood Fabert and Keith Kemper, as partners, operated a Lincoln-Mercury franchise in Champaign, Illinois, beginning in 1940 (App. 37). Both entered the armed services in 1942, rising to officer rank (App. 46), and were discharged in 1946 (App. 37, 46), at which time the partnership franchise was renewed. This franchise was operated until 1955, with the franchise net annual profits averaging $54,264.37 during this period (App. 38).

In 1955, the partners determined to dissolve the partnership. Both applied for the continuation of the franchise, with the defendant, Ford Motor Company, selecting Fabert over Kemper (App. 38). Fabert paid Kemper a considerable sum of money in cash, and conveyed to him certain vehicles and all of Fabert's interest in two commercial franchises owned by the partnership (App. 38). The continuing franchise was incorporated as Fabert Motors, Inc., wholly owned by the Fabert family, and the payments made to Kemper appear in the corporate balance sheet as debts owing to officers and shareholders (App. 38).

From 1955 to 1958, it was testified in Henry Ford's deposition, there was a sharp slump in the automobile industry in general (App. 148), and financial research records of the company showed the majority of Lincoln-Mercury dealers suffering losses in 1958 (App. 148).

In the fall of 1956, the defendant declared Rantoul, also located in Champaign County, an "'open point'' and in-

sisted that Fabert open a place of business there or the defendant would give a franchise to a competing Lincoln-Mercury dealer (App. 83, 84). Plaintiff's president, Elwood Fabert, protested that plaintiff could handle the Rantoul business effectively from Champaign and that such an operation would create a double overhead (App. 39, 84, 109). He was overruled—although defendant's field accountant testified that in 1958 he recommended the closing of the Rantoul operation as an unnecessary expense (App. 119). Defendant even produced a manager for the Rantoul operation who sold numerous cars under conditions producing many repossessions and great loss to plaintiff; this manager also embezzled substantial sums of money, only a fraction of which was recouped from the bonding company (App. 86, 88).

In addition, the defendant introduced the Edsel in 1957 which covered the same general size, weight, and price class as the Mercury (App. 135, 141), and which captured about 40% of its market from other Ford products (App. 149). In addition, the engine used in the large Mercurys and Lincolns in the 1958 model, introduced in the fall of 1957, was defective—and this caused substantial shrinkage in sales and resulting losses to dealers in 1957, 1958, and early 1959 (App. 149, 151).

As a result of these matters, the plaintiff's operation showed an annual net loss in the years 1956, 1957, and 1958. Moneys were advanced by its shareholders, as necessary, to the corporation; and, when a Bulk Sales Affidavit was filed on September 14, 1959—excluding shareholder advancements and indebtedness upon cars and parts, which it was agreed was customary in the trade (App. 44) —there was less than $11,000 owing to all third party creditors (App. 44) on an operation grossing annually in excess of a half million dollars (App. 44). Defendant's reports showed that plaintiff was at all times cooperative, that it conducted a good parts and service operation, and

that plaintiff was an "excellent dealer" (App. 116, 120, 121).

However, defendant had introduced the Edsel automobile in September, 1957, as a line of cars comparable to and competitive with the Mercury (App. 135, 141). By early December, 1957, Robert McNamara, an official of the defendant, had reported to defendant's Executive Committee, which report was approved by such Committee, that the Edsel program as it then existed was doomed to failure, leaving several optional courses of procedure, one of which was to cancel the whole program immediately, but that this would have adverse effects upon defendant's reputation and leave the defendant stuck with a number of unsaleable cars (App. 27, 156). Other studies and communications went back and forth from McNamara to the Executive Committee from which the following emerged: 1. The Edsel was a money loser both for the defendant and its Edsel dealers from the beginning, and had no prospects to be other than a money loser (App. 140, 141, 157, 160); 2. The Edsel dealers as a group lost money on their investments, the number of Edsel dealers shrinking from 1400 at the maximum to 226 on January 1, 1959, to 5 on November 18, 1959 (App. 136, 173). Despite the fact of these constant losses, and the negative outlook for the Edsel, Henry Ford upon February 19, 1959, wrote all of defendant's dealers as follows (App. 158):

> "You know that the Company regards the Edsel as a permanent member of the Ford Family of Fine Cars and that we are confident that the Edsel can and will prove to be a successful and profitable entry in present and future automotive markets. * * * We believe that the future for the Edsel is an excellent one, and we are backing up that belief with all the resources and talent required."

Early in 1958, the Executive Committee had decided upon a dualing program. This meant, simply, that the

Lincoln-Mercury dealer in any community would be ordered to take on the Edsel franchise (App. 136, 137), and to invest the additional amounts necessary for Edsel cars, parts, and equipment (App. 128, 159, 160). If the Lincoln-Mercury dealer refused to take on the Edsel franchise, the "facing" (i. e., dealer in the same community) Edsel dealer would be offered the refusing party's Lincoln-Mercury franchise (App. 28). This consolidation program was carried out on a nationwide basis (App. 136), and both Edsel dealers and Lincoln-Mercury dealers lost their franchises as a result (App. 137, 158, 173).

Upon May 13, 1958, the defendant's representatives, without plaintiff's knowledge, approached Eichhorst Motor Company, the Champaign Edsel dealer, with specific written instructions to terminate his franchise and merge it with the plaintiff (App. 132, 133). However, Eichhorst refused to surrender his franchise and defendant instructed its representatives to wait for "Phase 2"—a term which is never explained by any of defendant's officers or agents in their depositions (App. 133).

In February, 1959, T. A. Coward, regional manager of the defendant, called at plaintiff's premises and, according to plaintiff's version (which we must accept as true) told Elwood Fabert and his son that plaintiff would have to take on the Edsel franchise and invest an additional $40,000 to $50,000 in Edsel cars, parts, and equipment (App. 73). Elwood Fabert stated that plaintiff wanted nothing to do with the Edsel (App. 73, 74). He was told that plaintiff had no choice—that plaintiff would acquiesce or be cancelled (App. 74). Fabert asked for time to think it over.

Upon June 23, 1959, Coward returned to plaintiff's premises. He asked Fabert what plaintiff's decision was. Fabert stated that plaintiff would not take on the Edsel; it intended to sell Lincoln-Mercury automobiles as before

(App. 64, 101). Coward stated that plaintiff had no choice—that either it would take on the Edsel line, and invest those additional funds in it, or plaintiff could resign, or it would be cancelled. If cancelled, it would give plaintiff and Fabert a "black eye" and they could never get another franchise (App. 41, 64, 67, 74). Furthermore, Fabert would be wholly dependent upon market price for appraisal of signs and special equipment, which would be almost worthless to anyone not in that line (App. 64, 74, 102, 103). However, if plaintiff resigned peaceably, Coward would get plaintiff a better price for tools, signs, and equipment plus two-years' rental instead of the one year provided by the franchise in the instance of involuntary cancellation (App. 74, 102). It is not contended, by the way, by the defendant that any notice was given or other steps taken to effect an involuntary cancellation under the terms of the written franchise agreement.

Elwood Fabert testified that he believed Coward's representations, that he believed plaintiff had no choice, that he felt it was suicidal to take on the Edsel, and that plaintiff could not afford a "black eye" resulting from a cancellation (App. 41, 67). Based upon those beliefs together with the economic pressures created by the situation which had developed from 1956 through 1958, Fabert told Coward plaintiff would resign (App. 67). Coward wrote out in his own handwriting (App. 131, 125) a form for plaintiff to have typed up for this purpose. This was typed, signed, ratified by corporate minutes, and sent to Coward in a modified form after Coward had called Fabert and required the rent figure to be reduced from 24 months to 18 months (App. 42, 65, 79). After plaintiff had sent in this letter, defendant insisted this rent figure to be reduced to 12 months, and the form was rewritten with this change (App. 66, 82, 83).

Plaintiff redelivered to defendant its new cars, special tools, signs and equipment, receiving periodic checks or

credits as such items were received, plus the rent check of $24,000 upon signing a general release upon October 2, 1959, prepared by defendant, with the modification of inserting certain exceptions as to pending adjustments and an existing law suit based upon breach of warranty which matters had not then been concluded (App. 32, 33, 34, 35, 36).

Elwood Fabert testified that the franchise which the plaintiff was compelled to surrender had a fair cash market value of $300,000, based upon an average annual earnings during the period of 1946 through 1959 of more than $30,000 (App. 94, 95). Defendant, in its communications to dealers, also used a capitalization basis of 10% for the evaluation of a going business (App. 134).

SUMMARY OF ARGUMENT.

The defendant, Ford Motor Company, possessed vast economic superiority over the plaintiff, its Champaign, Illinois, Lincoln-Mercury dealer. It used this superiority unfairly by compelling plaintiff to open a second outlet (which caused serious financial inroads and which defendant agreed two years later served no useful purpose and discontinued). It introduced the Edsel as a car competitive to the Mercury; then, when the Edsel was an obvious failure, set up a dualing program. This was simply a program of "tying" the Edsels to the Lincoln-Mercurys; and, unless a Lincoln-Mercury dealer would take on the Edsel and invest an additionl $40,000 or more in such cars and parts, he would lose his existing franchises.

It is the plaintiff's position that the forced resignation of plaintiff, because of its refusal to take on the Edsel, was a result of economic coercion and precisely the thing which the Dealer's Day in Court Act was designed to prevent. Whether the release was executed of the plaintiff's own "volition", or was the result of compulsion, presents

a jury question. If the mere fact that a release was executed deprives a dealer of a right to jury trial, then there never would be a judicial remedy in any instance of forced resignation, since the manufacturer always would require some such instrument to be signed before repurchasing the dealer's cars and parts under the franchise agreement. Also, since the release was an Illinois contract, the Illinois law which requires the issues of "volition versus compulsion", and the adequacy or inadequacy of consideration, to be determined by the trier-of-fact inhibits the entry of a summary judgment, as was done here.

Such "tying" requirement also violated the Sherman Act.

ARGUMENT.

This is the Edsel case. Long the butt of comedians' jokes, it was no laughing matter to those Ford-franchised dealers who were told in 1958 and 1959 "take this automobile off our hands or lose your existing franchises"—and who lost franchises of great value because they would not do so.

The Seventh Circuit, it may be recalled, has an antipathy for civil antitrust cases and leads in the scoring race of reversals by this Court of such controversies. It has a like antipathy to the "Dealer's Day in Court Act" (15 *U. S. C.*, §§ 1221-1224) which confronted it for the first time in this suit, and which statute, apparently, presents a case of first impression in this Court. Although this statute was passed expressly to prevent cancellations, terminations, and forced resignations of a franchise if the dealer should refuse an unreasonable demand, the lower courts blithely ignored the statutory purpose as well as its wording.

The reason given below was, substantially, that the dealer had signed a "release" upon payment to him for his stock of new Lincolns and Mercurys, parts, tools, and rental payments. They failed to recognize that no case ever could arise of forced resignation without such an instrument having been signed. Certainly the manufacturer is not going to pay out funds in the repurchase of cars, parts, equipment, and premises rental—whether its action be innocent or culpable—without having such a document signed. The question was not what the words of the instrument recited, *but was its execution induced by duress*? And this point the Court of Appeals never grasped.

This is a controversy of universal importance, having a nationwide impact. All automobile manufacturers use a

printed form of franchise agreement which they prepare—and it was the abuses permitted to be perpetrated under such agreements and the coercive practices of manufacturers which led to the passage of the Dealer's Day in Court Act (Addendum, p. 1), Burns, *A Study of the Antitrust Laws,* pp. 436-465. The defendant, Ford Motor Company, prepared the contracts under which the original franchises were awarded (App. 91, 92), and under which the dealers made tremendous investments in their buildings, equipment, and inventory. A terminated dealer obviously will not receive one dime from the manufacturer without executing an instrument meeting the approval of such manufacturer. The more desperate the plight of the dealer, the more subject to pressure, the more susceptible to duress, he is—and the more likely he is to sign the instrument which the manufacturer demands. If, accordingly, the execution of a release *ipso facto* destroys the dealer's remedy, then the duress and compulsion inhibited by the statute could not even be considered by a jury—and this is precisely what the lower courts held in determining this issue upon a motion for summary judgment. Further, since a release is demanded by the printed franchise agreements, Ford, at least, would be immune from suit on any forced resignation.

If a dealer can be deprived of a franchise worth, as this one was (based upon the affidavits and depositions, App. 94), $300,000 with only a minimal payment or no payment made for its value, then the statute clearly is a sham and does not protect the dealer. Similarly, the "tying" of the Edsel to the continued purchase of Lincoln and Mercury automobiles would be condoned by a failure to grant review in this case. This is not the situation of a small manufacturer struggling for survival against the Big Three. It is a situation of one of the Big Three using its overwhelming economic power to impose unfair conditions upon its dealers.

In the explanation of the bill (Addendum, pp. 4, 5) it is stated:

> "Manufacturer coercion or intimidation or threats thereof is actionable . . . where it relates to the termination, cancellation, or nonrenewal of the dealer's franchise. * * * This bill assures the dealer an opportunity to secure a judicial determination, irrespective of the contract terms, as to whether the automobile manufacturer has failed to act in good faith in performing or complying with any of the provisions of his franchise or in terminating, canceling, or not renewing his franchise . . ."

It will be noted that the word "terminating" is used as well as "canceling". Obviously, then, a situation of forced resignation is contemplated, since otherwise there would be no need for the use of both terms. If judicial inquiry is contemplated, then it seems reasonable that it was intended to permit a jury to determine factual questions, instead of a trial court determining them as a matter of law by way of summary judgment.

Under the facts as herein stated, it would seem that the plaintiff has a right to jury trial. With reference to the matter of coercion, intimidation, and moral or economic duress, it was stated in 17 A *American Jurisprudence* 558:

> "Originally at common law, duress was limited to a narrow and restricted field, and according to the common-law doctrine and some later authorities following the common-law rule, to constitute duress there must be such constraint as is sufficient to overcome the mind and will of a person of ordinary firmness. However, there has been a gradual relaxation of these rules and under the modern doctrine of duress, the pressure applied does not have to be such as to overcome the will of a brave or courageous man, or even that of a man of ordinary firmness, but is

sufficient if it in fact overcomes the will of the person against whom it is applied."

As pointed out in Wolf v. Marlton Corp., 57 N. J. Super. 278, 154 A. 2d 625 at 630:

> "* * * a threat may be wrongful even though the act threatened is lawful. We have come to deal, in terms of the business compulsion doctrine, with acts and threats that are wrongful, not necessarily in a legal, but in a moral or equitable sense."

In that case, the plaintiff had threatened, if forced to perform the contract, to resell the house to an undesirable buyer and thus ruin the builder's reputation. It was held that this being duress, it was an anticipatory breach preventing recovery of the down payment.

The Illinois law has long recognized the fact that duress may be accomplished without placing a gun in the ribs of an individual in order to compel action from him. We have recognized that fear, whether physical or mental, economic pressure, or coercion of any type may vitiate the benefits secured as a result of such reprehensible conduct. One of the earliest decisions recognizing such terminology is Bradford v. City of Chicago, 1861, 25 Ill. 349 at 359:

> "But where a necessity, which is a kind of moral duress, exists, he may recover."

The doctrine has been announced in many cases in Illinois, including the recent case of Allison Co., Inc. v. Village of Dolton, 24 Ill. 2d 233, at 236, 181 N. E. 2d 151, citing Robertson v. Frank Brothers, 132 U. S. 17. The case of Slade v. Slade, 310 Ill. App. 77, 33 N. E. 2d 951, gives an extensive discussion of the Illinois cases, and, at page 87, defines moral duress as "the taking of undue advantage of the business or financial stress or extreme necessities or weakness of another."

That case also points out, at page 82, quoting from 13 Corpus Juris, that:

"'* * * the question of duress is one of fact in the particular case, to be determined on consideration of the surrounding circumstances, such as age, sex, capacity, situation, and relation of the parties; and that duress may exist, whether or not the threat is sufficient to overcome the mind of a man of ordinary courage, it being sufficient to constitute duress that one party to the transaction is prevented from exercising his free will by reason of the threats made by the other, and that the contract is obtained by reason of such fact.' * * *

"'Where the parties are not at arm's length, but one of them is in a position to dictate, the courts will treat agreements which are influenced by threats of injury to, or the withholding of, property as made under duress * * *.'"

And the court added at page 86:

"'* * * the rule of duress and its application depends entirely upon the facts established at a hearing of the merits. There are other cases, where money or property having been accepted, it has been held the acceptance of such money is not a voluntary payment. They either had to accept it or depend on tort litigation as was suggested by the parties in this litigation."

Moreover, the court pointed out in *Slade* that it is not always necessary to rescind the offending contract. Rather, the plaintiff "may affirm the transaction, as far as it has gone, and sue in tort for her damages sustained by reason of the defendant's wrongful acts" (p. 88). Furthermore, if this is done, then, as pointed out in News Publishing Co. v. Associated Press, 114 Ill. App. 241 at 256, the plaintiff may, of course, bring suit at any time before it is barred by the Statute of Limitations. And in our case, we are not seeking to have the contract of termination cancelled and the franchise restored. The damage has already been

done; another was installed as Lincoln-Mercury dealer when the Fabert franchise was terminated.

So far as the antitrust violation is concerned, we refer to the opinion of this Court in Northern Pacific Railway Co. v. United States, 356 U. S. 1 at 5, 6:

> "For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. * * * '[T]ying agreements fare harshly under the laws forbidding restraints of trade.' Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 606, 73 S. Ct. 872, 879, 97 L. Ed. 1277."

And this is exactly what Ford did here. Mercury (and the Lincoln) was the desired product—indeed Fabert had a franchise entitling him to purchase such automobiles. But suddenly he was told, you cannot purchase any more Mercurys unless you purchase Edsels as well. Fabert did not want the Edsel. In fact, the tied product was so undesirable that the seller, Ford, did not want it either. In fact, some 47 days after completing the cancellation of the plaintiff for refusing to deal in the tied product, it, itself, discontinued making the Edsel.

The defendant has argued that there was no tying or forced sale arrangements because Fabert did not desire to deal in another type of car. As a matter of practical logic, however, the money had to come from somewhere; either the plaintiff would have to reduce its purchase of used cars, or its purchase of cars to be leased. Either could include cars not manufactured by Ford. But this test is required only under the specific language of Section 3 of the Clayton Act. The Sherman Act was meant to cover broadly certain types of inhibited conduct. Perhaps the clearest example of this principle is to be found in United States v. Paramount Pictures, 334 U. S. 131 at

156-159. There the defendants, distributors of films, were found guilty of violating the Sherman Act, Sections 1 and 2, by such practices as block-booking. This practice entailed the licensing of films in blocks, preventing competitors from bidding for films on their individual merits. There was no allegation that the prospective licensees were prevented from purchasing films of other producers if they so desired. But this was held to be an antitrust violation since it added "to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses."

And such reasoning would apply here where Ford Motor Company had, by patent, copyright, and trademark, a monopoly over all of its cars. Most people purchase automobiles relying upon a trade name; that is, they buy a Mercury or a Dodge rather than simply a blue car. Each brand of car is unique. And this uniqueness is what gives the product its tying power. Thus we have a situation similar to that in United States v. Loew's Incorporated, 371 U. S. 38, 48, where this Court stated:

> "The district judge found that each copyrighted film block booked by appellants for television use was in itself a unique product'; that feature films 'varied in theme, in artistic performance, in stars, in audience appeal, etc.,' and were not fungible; and that since each defendant by reason of its copyright had a 'monopolistic' position as to each tying product, 'sufficient economic power' to impose an appreciable restraint on free competition in the tied product was present, as demanded by the *Northern Pacific* decision. 189 F. Supp., at 381. We agree."

This Court went on to say, in a footnote:

> "To use the trial court's apt example, forcing the television station which wants 'Gone With the Wind' to take 'Getting Gertie's Garter' as well is taking undue advantage of the fact that to television as well

as motion picture viewers there is but one 'Gone With the Wind.' "

Thus it would appear that the defendant was guilty of tying or forced sales violations contrary to at least the Sherman Act but, also, probably, contrary to the Clayton Act. Nor is this prevented by the fact that Fabert never purchased the tied product but rather was forced out of business since he would not yield to the unlawful demands of the defendant.

In Simpson v. Union Oil Co. of Cal. (1964), 377 U. S. 13 at 16, the Union Oil Company refused to renew the consignment because the dealer would not fix prices, this action being part of an over-all price maintenance plan. The District Court entered a summary judgment for the defendant; this Court reversed, holding, as a matter of law, not even of fact, that price maintenance through the consignment agreement was illegal, saying:

> "The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the antitrust laws."

For an act in restraint of trade to violate the Sherman Act, Sec. 1, there may be either a "contract, conspiracy, or combination." The complaint alleged that Ford conspired with its dealers to restrain trade by tying the Edsel to the Mercury. Moreover, the complaint alleged an over-all pattern of making such tying *contracts*. It was these contracts which forced Fabert out of business.

To have a conspiracy, it is not necessary that co-conspirators gather around a table in a dimly-lit room and *sotto voce* discuss their nefarious schemes. Much less will be sufficient. This Court stated in Interstate Circuit, Inc. v. United States, 306 U. S. 208 at 226, 227:

> "It was enough that, knowing concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each

distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, * * * and knowing it, all participated in the plan. * * *

"It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. * * * Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

That language was adopted by this Court in United States v. Masonite Corp., 316 U. S. 265 at 275, in which this court pointed out that a conspiracy could still exist even though each dealer "desired the agreement regardless of the action that might be taken by any of the others, did not require as a condition of its acceptance that Masonite make such an agreement with any of the others, and had no discussions with any of the others." This court also pointed out at 275, 276, "* * * the fact that Masonite alone fixed the prices and that the other appellees never consulted with Masonite concerning them [does not] make the combination any the less illegal. * * * The fixing of prices by one member of a group pursuant to express delegation, acquiescence, or understanding is just as illegal as the fixing of prices by direct, joint action." Moreover, it has been pointed out that a conspirator is not protected by a claim that the illegal scheme was forced on him, United States v. Paramount Pictures, 334 U. S. 131 at 161. So Ford cannot claim that there was no conspiracy because it forced the other dealers to join in its scheme. Nor can it object that the other conspirators were not joined in the suit since each conspirator remains fully liable for the acts of all.

In addition, Ford was guilty of imposing tying contracts upon its other dealers. It is not necessary, it must be remembered, for any conspiracy whatever to be shown, so long as a practice of "contract" is shown which accomplished an illegal result. The plaintiff, in order to buy Mercury automobiles and to retain its existing franchises, would have been forced to accept a contract obligating it to assume an additional franchise—that of the Edsel—as well, with the accompanying expense of Edsel automobiles, parts, and equipment. To accomplish its dualing program, Ford had to force out of business either these Mercury dealers who would not accept the Edsel franchise or those Edsel dealers who already dealt in the tied product (App. 137). Thus the very existence of these contracts caused injury to the plaintiff. And this was a proximate injury, for Fabert was among those upon whom the restraints were being directly practiced.

It is not necessary that the extent of the antitrust violation have been earth-shaking. Indeed when the purpose of the Sherman Act is to protect the little man and small business, it is apparent that an abuse of his rights may not be of vast importance to the nation as a whole. As stated in United States v. Yellow Cab Company, 332 U. S. 218 at 225:

> "But the amount of interstate trade thus affected by the conspiracy is immaterial in determining whether a violation of the Sherman Act has been charged in the complaint."

This Court pointed out the irrelevance of the extent of public injury when it stated in Klors v. Broadway-Hale Stores, 359 U. S. 207, 213, that a boycott was not to be "tolerated merely because the victim is just one merchant whose business is so small that his destruction can make little difference to the economy". This rule was reiterated in Radiant Burners, Inc., v. Peoples Gas, Light and Coke Co., 364 U. S. 654 at 660, and in In Re

McConnell (1962), 370 U. S. 230 at 231. Thus, it was further stated in the first of those cases:

> "* * * to state a claim upon which relief can be granted under that section (§ 1), allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires."

It is not necessary, accordingly, to show a great and permanent harm to the public at large. Damage to the plaintiff was all that was required under the circumstances of this case. And just recently, this Court pointed out in Simpson v. Union Oil Co. of Cal., *supra*, 377 U. S. 13 at 16, a case involving the cancellation of a gasoline consignment agreement due to a refusal to fix prices:

> "There is actionable wrong whenever the restraint of trade or monopolistic practice has an impact on the market; and it matters not that the complainant may be only one merchant. * * * The fact that, on failure to renew a lease, another dealer takes Simpson's place and renders the same service to the public is no more an answer here than it was in Poller v. Columbia Broadcasting System, 368 U. S. 464, 473. * * *"

The lower courts seemed influenced by the fact that the discussions and execution of instruments took place over a period of months, and that the plaintiff did not immediately bring his action for damages. These are only factors to be considered upon the trial of the case. Otherwise, a trial judge would be placed in the position of determining whether two days is a reasonable period and three months too long, and other determinations which properly belong to the trier-of-fact. Where coercion or duress are applied, then an additional factor enters in. That is, was the effect of the duress—or the economic domination of the plaintiff by the defendant—ever effectively terminated before the release was signed? As stated in 17A *American Jurisprudence*, pages 594, 595:

"It is essential that the influence of the duress must be removed before conduct becomes voluntary. The fact that the act which was done under duress is not repudiated for a long time will not amount to a ratification where it appears that at no time during such period of time was the duress removed."

Similarly in 77 *A. L. R.* 2d at 434, 435 is stated:

"* * * the intention to ratify is an essential element and is at the foundation of the doctrine of waiver or ratification. * * *

" 'It is essential to the ratification of a contract procured by duress that the influence of the duress have been removed prior to the alleged ratifying conduct.' "

Likewise, it is stated in that same *A. L. R.* annotation at page 446:

"The effect, as such, of the alleged ratification of a contract induced by duress has been denied where it appears that at the time of the alleged ratification, or up to the time that repudiation is sought or that duress is urged as a defense, the duress that originally induced the contract has continued to operate."

Illinois follows that rule, Harris v. Flack, 289 Ill. 222, at 231, 232, 124 N. E. 377.

The Court of Appeals also mentioned the fact that the plaintiff dealership was represented by counsel. Every person has access to legal advice. If the fact of such access, or even of legal representation, rendered all releases effective, then the existence of fraud or duress would give no remedy against such overreaching. Absurd consequences well could result. For then if a man were to threaten to kill a loved one unless I should sign over a deed to him, and my lawyer, while lying under the table for protection, shouted: "Don't do it, he has no legal right to shoot," and I did hand over my deed, then ac-

cording to such reasoning I could not cancel it. Yet this result would scarcely seem to be reasonable or just.

In the present case, Lewis Tanner, who drew up the minutes of the so-called shareholders' meeting (it was a family corporation), was primarily an accountant and Hertz rental agent—as pointed out by the affidavit (App. 42) which is not subject to contradiction. He had originally secured the corporate charter for the plaintiff. But it has been stated by Mr. Fabert that at no time did he receive legal advice from Mr. Tanner on the situation here involved. It would not be expected that a man who acted as a lawyer part-time and whose main fields of endeavor lay in other directions, would be able to advise a client fully as to the existence of rights under statutes ordinarily known only to legal specialists.

And, assuming that Illinois law may bear upon the release, the Illinois cases indicate that the presence or availability of an attorney is merely a circumstance to be considered in determining whether duress existed at all. For example, in Illinois Merchants Trust Co. v. Harvey, 335 Ill. 284 at 288, 167 N. E. 69, it was the attorneys for the trustees who made the payment under protest. Yet that fact did not determine the issue. As before pointed out, the Illinois Court looked to see if there was an easy remedy available instead. One would assume that a coal company would have an attorney, yet duress was found in the case of Chicago and Alton Railroad Co. v. Chicago, Vermilion and Wilmington Coal Co., 79 Ill. 121. Similarly, since the defendant was being sued when it paid the plaintiff in Pittsburgh Steel Co. v. Hollingshead & Blei, 202 Ill. App. 177 at 180, one might assume that it was then represented by counsel. The plaintiff in that case carefully pointed out that "defendant had full knowledge of the facts and was fully advised as to its rights." Nor was this denied by the defendant. Yet duress was still found to have existed.

That court emphasized that the fact that the defendant had full knowledge of the facts and of the law does not alter the fact that the plaintiff was guilty of duress. How much more is this true where the party guilty of duress or his agent has misrepresented the law as Coward did when he informed Fabert that Ford could cancel at any time for any reason, contrary to the Dealer's Day in Court Act! And Illinois has held that misrepresentations of law, even innocent misrepresentations, are grounds for rescission, Smyth v. Kasper American State Bank Co., 6 Ill. App. 2d 64 at 78, 127 N. E. 2d 149, affirmed 9 Ill. 2d 27, 136 N. E. 2d 796:

> "Whether the mistake is a mistake of law or of fact is not the important question when relief is sought in a court of equity."

The reasoning of Clancy v. Pacenti, 15 Ill. App. 2d 171 at 177, 145 N. E. 2d 802, which concerned a mistake of fact as to the degree of injury rather than a misrepresentation of law, might be applied here:

> "The sharp economic inequality of the bargaining parties which generally exists in this class of cases has also been considered by the courts in their consideration of the doctrine. It is by no means as modern an innovation as to some may appear."

The foregoing case points out that, under Illinois law at least, no return of consideration of the amount paid for a release is necessary prior to maintaining suit upon the underlying cause of action. And, in this case, that would be particularly true. All of the payments received by the plaintiff from the defendant were for tangible things—automobiles, equipment, parts, signs, etc.—except for $24,000, which was for "premises rental." The amount of that sum which could be ascribed, if any could be, as consideration for the intangible value of the franchise would be for a jury to determine. The plaintiff offered

by its complaint to pay to the defendant any sums found to exist as consideration, or to credit such amount upon the judgment; but these amounts, if any there be, must be determined by a jury.

If the efficacy of the release, being a contract in itself, is controlled by the law of the state in which it was executed, Illinois, then clearly a summary judgment would seem to be improper. Under the Illinois rule applicable to releases, as most recently pronounced by its intermediate court, the scrutiny of the circumstances is always for the trier-of-fact and it is not susceptible of being concluded by summary judgment, Reede v. Treat, 1965, 62 Ill. App. 2d 120 at 129, 210 N. E. 2d 833:

> "In furtherance of such policy, it has been stated that Illinois does not permit the language of the release, no matter how all-encompassing, to bar the chancellor from scrutinizing the release and the circumstances of its execution for fairness."

And this pronouncement is consistent with the most recent ruling of the Illinois Supreme Court in Bowman v. Illinois Central Railroad Company, 11 Ill. 2d 186 at 202, 142 N. E. 2d 104 (involving an F. E. L. A. case).

This would seem to be consistent with the view of this Court, as pointed out in Poller v. Columbia Broadcasting System, Inc., 368 U. S. 464 at 473:

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"

CONCLUSION.

It is, therefore, respectfully submitted that a writ of certiorari issue to review the judgment and orders of the Court of Appeals of the Seventh Circuit, heretofore entered in this cause.

Respectfully submitted,

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Certificate of Service.

I hereby certify that a true copy of the foregoing petition for writ of certiorari to the Court of Appeals of the Seventh Circuit has been served on W. Donald McSweeney and William A. Montgomery, Attorneys at Law, 231 South La Salle, Chicago, Illinois, this ... day of March, 1966.

Arthur L. Price, Jr.